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CASE NO.

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1994

MARK BRADLEY KLINGINSMITH
VS.
UNITED STATES

"PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT"

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court err in denying the defendant's motion to suppress marijuana seized by law enforcement officers?

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, not yet reported, appears in appendix A hereto. The District Court's Memorandum and Order denying defendant Klinginsmith's "Motion to Suppress" appears in appendix B hereto.

JURISDICTION

Mark Bradley Klinginsmith petitions the United States Supreme Court for a writ of certiorari reviewing the Tenth Circuit Court of Appeals opinion filed on June 17, 1994 denying his appeal of his United States District Court (District of Kansas) criminal convictions. Defendant relies on 28 U.S.C. § 1254 which confers jurisdiction on the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On November 12, 1992, the Kansas Highway Patrol (KHP) erected signs warning of a "narcotic check lane" on northbound I-35 at the Melvern exit in Osage County, Kansas. Fred Aldon Magee and Mark Bradley Klinginsmith were northbound on I-35 and exited at the Melvern

exit.

Troopers Heady and Simone, both of the KHP, were alerted to Klinginsmith's vehicle through radio traffic. Testimony indicated that neither trooper observed the vehicle commit any traffic infractions nor did they have any information connecting this vehicle or its occupants with any crime. Heady and Simone, in separate cars, pursued this car at high rates of speed.

Heady and Simone indicated they were pursing this car in order to determine why a vehicle with Nebraska plates would exit I-35 in such a desolate area. Klinginsmith's vehicle, driven by Magee, pulled into the first available area to stop which was a gas station. Heady and Simone parked directly behind them. At this time, Heady turned on his video camera. It was 10:56:10 a.m.

At 10:57:07, Simone told Heady that there

was dope in the car and to go ahead and take it. Simone and Heady both testified they had no specific information at that time to support that statement. Simone had already taken the drivers licenses from each defendant and the rental papers for their car and handed them to Heady. Trooper Dick arrived on the scene at about 10:58 with his drug sniffing dog, Chief. Heady questioned Magee in his KHP vehicle. Heady first asked Magee if he had broken the law at 10:58:42. He made reference to law violations several more times in the following minutes as indicated by the audio portion of the videotape. Heady testified the audio was turned off or shut off four times during the videotaping of the event. Heady returned both drivers licenses to Magee after questioning him but did not return the rental agreement.

Klinginsmith walked into the station at

11:01 to use the bathroom. He had complained of diarrhea and had soiled clothing in the back seat of the car. Magee had made reference to Klinginsmith's condition, telling Heady that Klinginsmith had "shit on himself" some miles back and needed to use the bathroom. Trooper Thomason is observed on the videotape trotting after Klinginsmith who was walking toward the station. Simone entered the bathroom after Klinginsmith and frisked him. Simone testified that Klinginsmith was not under arrest at that time. Simone searched the bathroom and found nothing of interest.

Klinginsmith was confronted by Heady upon exiting the bathroom at 11:06:03 a.m. Heady told Klinginsmith he was suspicious of his actions. Heady noted that Klinginsmith appeared nervous. Klinginsmith is heard on the audio complaining about being searched in the bathroom. Heady continually followed

Klinginsmith around the restroom and asked him if he was involved in anything illegal, or if there were drugs, firearms, or large sums of money with them. Klinginsmith and Magee both indicated their trip originated in Mississippi where they were building parking lots. Heady returned the rental agreement to Klinginsmith and informed him that Magee had the licenses.

Heady then obtained consent from Klinginsmith and Magee to search the vehicle. At 11:12:05 Simone is heard telling Heady, "just between you and I, I hope there's no dope in there because this thing's fucked up..." Heady interrupted Simone saying, "shhh" and turned the tape off.

Trooper Dick's dog was used to sniff the vehicle. It alerted to the vehicle and the troopers handcuffed Klinginsmith and Magee. Following the alert the troopers repeatedly demanded that Klinginsmith provide them with a

key to the trunk. They finally removed Klinginsmith's handcuffs to enable him to get the key for them. After obtaining the key, the troopers opened the trunk to discover approximately 180 pounds of marijuana in bundles. Two paper bags containing much smaller amounts of marijuana were found, one inside a green suitcase.

On January 11, 1993, Klinginsmith filed a motion to suppress the evidence discovered, including the marijuana and statements made to law enforcement officers. A hearing was held on this motion and Judge Rogers issued a ruling in his Memorandum and Order filed March 26, 1993. Judge Rogers denied in part the motion to suppress. He suppressed any statements made by the defendants following their arrest but did not suppress the search and subsequent discovery of the marijuana.

At the suppression hearing, testimony of

Wendell Barker was proffered. Mr. Barker was the former county attorney of Franklin County, Kansas who was familiar with Trooper Simone. The proffered testimony was that Simone had a poor reputation in the law enforcement and judicial community of Franklin County for honesty regarding his handling of automobile search and seizure cases. It was further proffered that Simone had a habit of stopping vehicles displaying out-of-state tags versus similarly situated vehicles with in-state tags. Judicial notice was taken of United States v. $83,900.00, 774 F.Supp. 1305, 1314 (D. Kan. 1991) in which the Honorable Franklin Theis held as follows:

> Trooper Simone testified that he routinely stops drivers who fail to signal lane changes, regardless of the amount of traffic on the highway. The court did not find this testimony to be particularly credible. The court does

> not believe that a reasonable Kansas Highway Patrol Trooper would have made the decision to stop the Bosworth vehicle for failing to signal a lane change or a rural stretch of Interstate 35 with little other traffic present. The court concludes that the initial stop of the Bosworth vehicle was a pretext to question the occupants about illegal activity.

On December 16, 1992 Mark Bradley Klinginsmith was indicted in The United States District Court (District of Kansas) and charged with possession with intent to distribute marijuana and conspiracy to distribute marijuana.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit, in rendering its decision in the case at bar, has so far departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by the trial court by denying Mr. Klinginsmith's appeal that review by the United States Supreme Court is necessary for the following reasons:

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Supreme Court has delineated three types of police-citizen encounters: (1) consensual encounters which do not implicate the Fourth Amendment, see e.g. Michigan v. Chesternut, 486 U.S. 567, 574-76, 108 S.Ct. 1975, 1979-81, 100 L.Ed2d 565 (1988); INS v. Delgdo, 466 U.S. 210, 218-21, 104 S.Ct. 1758, 1763-65, 80 L.Ed2d 247 (1984); (2) investigative detentions which are Fourth Amendment seizures of limited scope and duration and must be supported by a reasonable suspicion of

criminal activity, see e.g. United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed2d 1 (1989); Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868; 1884-85, 20 L.Ed2d 889 (1968); and (3) arrests, the most intrusive of Fourth Amendment seizures and reasonable only if supported by probable cause. See e.g. Hayes v. Florida, 470 U.S. 811, 815-16, 105 S.Ct. 1643, 1646, 84 L.Ed2d 705 (1985); Dunaway v. New York, 442 U.S. 200, 212-16, 99 S.Ct. 2248, 2256, 60 L.Ed2d 824 (1979). The encounter between the KHP and Magee and Klinginsmith was an investigative detention which was not supported by a reasonable suspicion of criminal activity.

If the initial encounter was "consensual" it quickly changed to an investigative detention as a result of the troopers' conduct. In Florida v. Bostick, ___U.S.___, 111 S.Ct. 2382, 115 L.Ed2d 389 (1981), the

Supreme Court set forth the governing standard for determining whether a police citizen encounter implicates the Fourth Amendment. The Court held that all the circumstances must be considered to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter. Id. at 2389. In U.S. v. Bloom, 975 R.2d 1447 at 1454 (10th Cir. 1992), the Court found that directly incriminating questions "would tend to communicate to a reasonable person that, as the specific target of the agent's investigation, he was unable to terminate the encounter."

In our case, Trooper Heady told both defendants at the outset of his conversations with them that he was suspicious of their activities. He asked both Klinginsmith and

Magee if they were carrying contraband, weapons, drugs or large sums of money. These statements would communicate to a reasonable person that their freedom to leave was restricted.

Also, the defendants in this case were outnumbered by the troopers. All the troopers were in uniform and their presence was obvious in a small parking lot. The fact that Magee and Klinginsmith were outnumbered by law enforcement officers who were "in uniform and visibly armed...tends to support an objectively reasonable belief that [they were] unable to terminate the encounter." Id. at 1454

Adding to the restraint of these defendants is the fact that the troopers took their driver's licenses to run record checks and also took their car rental agreement. "When a driver has produced a valid license

and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning". U.S. v. Guzman, 864 F.2d 1512, 1519 (10th Cir. 1988) [citing U.S. v. Gonzalez, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985) and U.S. v. Recalde, 761 F.2d 1448, 1455 (10th Cir. 1985)] "In order to justify a 'temporary detention for questioning' the officer must also have reasonable suspicion 'of illegal transactions in drugs or of any other serious crime'." Id. at 1519 [citing Florida v. Roper, 460 U.S. 491, 498-99, 103 S.Ct. 1319, 1324, 75 L.Ed2d 229 (1983)]

Trooper Heady returned the drivers licenses to Magee. He then stated he wanted to clear up a discrepancy regarding the due date of the rental car with Klinginsmith. The prosecution could argue that Heady had a right

to question Klinginsmith regarding a "discrepancy" with the due date on the rental agreement for the purpose of determining whether he was entitled to operate the car. Heady discussed the rental agreement with Klinginsmith, was apparently satisfied and returned it to him. He then told Klinginsmith he had returned the licenses to Magee. At this point Magee and Klinginsmith should have been allowed to proceed on their way as they had produced valid licenses and proof they were entitled to operate the rental car. They were not allowed to leave, nor were they told they could leave. Any further detention must be supported by "reasonable suspicion of illegal transactions in drugs" Id. at 1519.

While he was using the bathroom, Klinginsmith was subjected to a patdown search by Trooper Simone. "Clearly, an officer's physical restraint of a person is a seizure."

Bloom, 975 F.2d at 1451. In Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. (1968), an officer seized defendant when he took hold of him, spun him around, and patted down the outer surfaces of his clothing. It is clear after considering all the circumstances that a reasonable person in Klinginsmith's position would not have felt free to terminate the encounter with the troopers. Therefore, this encounter was a "seizure" which implicated Fourth Amendment protections. This "investigative detention" by the troopers was not supported by reasonable suspicion of criminal activity.

"Evidence seized in a search conducted during an illegal detention must be suppressed unless there is sufficient attenuation between the detention and the consent to search." U.S. v. Turner, 928 F.2d 956, 958 (10th Cir. 1991). The alleged consent obtained by Heady

was during the illegal detention of Klinginsmith and Magee. There was no attenuation, weakening, or diluting of the illegal detention before the alleged consent was given. A gap in time or a change in location did not occur.

Likewise, the dog sniff occurred during the illegal detention and should not be allowed as a tool to give the troopers 'probable cause' to search the vehicle. A dog sniff has been held not to be a search within the meaning of the Fourth Amendment when it is employed during the lawful seizure of a vehicle. U.S. v. Moralez-Zamora, 914 F2d 200 (10th Cir. 1990)[emphasis supplied]. The seizure of this vehicle and its occupants was unlawful. The admission of the marijuana and all other evidence resulting from the search was objected to by defense counsel and overruled and denied by the Court in

accordance with its previous Memorandum and Order.

Thus, the analysis must boil down to whether the seizure was lawful or supported by a 'reasonable suspicion of criminal activity'. Trooper Simone and Heady remarked that both Klinginsmith and Magee appeared nervous. The "nervousness" was noted after Heady told both men he was suspicious of their activities. Nervousness standing alone is insufficient to create reasonable suspicion of criminal activity. U.S. v. 83,900.00 in U.S. Currency, 774 F.Supp. 1305 (D.Kan. 1991). Nervousness is not a sufficient basis for reasonable suspicion of an individual, and such assertions by the government should be treated with caution. U.S. v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992).

To determine whether the detaining officers have a reasonable suspicion that a

person is engaged in criminal activity, the totality of the circumstances must be examined. U.S. v. Cortez, 449 U.S. 411, 417-18, 10th S.Ct. 690, 694-95, 66 L.Ed. 2d 621 (1981). A 'hunch' is insufficient. U.S. v. Sokolow, 490 U.S. 1, 8, 109 S.Ct. 1581, 1585-86, 104 L.Ed2d 1 (1989) [quoting INS. v. Delgado, 466 U.S. 210, 217, 104 S.Ct. at 176 (1984); Terry 392 U.S. at 27, 88 S.Ct. at 1883]

The fact that two white males in shirts and ties were driving a vehicle with out of state license plates off the turnpike does not indicate even a hint of criminal activity. The troopers' methods in this case must also be questioned. Simone stated on the videotape that he hoped no "dope" was found in the car because "this things fucked up." Simone's poor reputation for honesty regarding these type of search cases and Judge Theis' holding

in United States v. $83,900.00, 774 F. Supp. 1305 (D. Kan. 1991) bring this entire operation in question. Nothing the troopers learned during their initial seizure of defendants gave them a reasonable suspicion of criminal activity to subject defendants to a investigative detention. Therefore, even viewing the evidence in the light most favorable trial courts finding, it is clear that the seizure was illegal and the evidence obtained from the subsequent search was inadmissable and should have been suppressed by the trial court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the Tenth Circuit should be granted.

RESPECTFULLY SUBMITTED,

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Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATE OF AMERICA,
Plaintiff-Appellee,

v. No. 93-3218

MARK BRADLEY KLINGINSMITH,
Defendant-Appellant.

Appeal from the United States District Court
For the District of Kansas
(D.C. 92-40062-02-RDR)

David Lind (Randall K. Rathbun, United States Attorney, and Thomas G. Luedke, Assistant U.S. Attorney, with him on the brief), Topeka, Kansas, for Plaintiff-Appellee.

Steven L. Davis of Patton, Davis & Putnam, Emporia, Kansas for Defendant-Appellant.

Before BALDOCK, Circuit Judge, and McWILLIAMS, Senior Circuit Judge, and SHADUR, Senior District Judge.*

McWILLIAMS, Senior Circuit Judge.

* Honorable Milton I. Shadur, Senior District Judge for the Northern District of Illinois, sitting by designation.

Mark Bradley Klinginsmith and Fredrick Aldon Magee were jointly charged in the first count of a two-count indictment with unlawfully conspiring on November 12, 1992, to possess with an intent to distribute approximately 182 pounds of marijuana, a Schedule I Controlled Substance, in violation of 21 U.S.C. §§ 846 (b)(1)(C). In the second count, both were charged with unlawfully possessing on November 12, 1992, with an intent to distribute approximately 182 pounds of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2.

Prior to trial, Magee, pursuant to a plea agreement, pled guilty to one count and agreed to testify against Klinginsmith and later did so.

A jury convicted Klinginsmith on both counts, and he was sentenced to imprisonment for 78 months. On appeal, Klinginsmith raises

three matters: (1) the district court erred in denying his pretrial motion to suppress the use at trial of the 182 pounds of marijuana found by the police in the vehicle which Magee was driving and in which Klinginsmith was a passenger; (2) the district court erred in denying his motion for a mistrial based on an alleged violation of the district court's sequestration order; and (3) the district court erred in determining that the amount of marijuana taken from his automobile was at least 80 kilograms, resulting in a base offense level of 24, whereas if the amount was less that 80 kilograms his base offense level would have been 22. We find no reversible error and affirm.

I. Motion to Suppress

Klinginsmith's first ground for reversal is the district court's failure to grant his motion to suppress the use at trial of the 182

pounds of marijuana seized in a search of his vehicle. In this regard, Klinginsmith claims that his Fourth Amendment rights were violated. The district court held an evidentiary hearing on this motion and denied the same, except as to some rather minor matters. More about that later. Some background facts as developed at the hearing on the motion to suppress will place this issue in focus.

The Kansas Highway Patrol ("KHP") developed a rather novel, to us at least, investigative technique for detecting drug couriers using Kansas highways. Interstate I-35, a four-lane highway, runs in a northeasterly direction from Wichita, Kansas, going through Emporia, Kansas and on to Kansas City, Kansas. We are here concerned with a light blue 1992 Buick LeSabre, bearing Nebraska license plates, which was proceeding

from Wichita to Kansas City on November 12, 1992. The vehicle was driven by Magee, and Klinginsmith was a passenger therein.

Exit 160 from I-35 leads to Melvern, Kansas, a small hamlet located in Osage County, Kansas. Just south of Exit 160, the KHP placed a large sign, visible to all driving northeasterly on I-35, which read as follows: "NARCOTIC CHECK LANE AHEAD." This sign was but a ruse, as there was no NARCOTIC CHECK LANE AHEAD. Exit 160 indicates that Melvern is to the north, and that a frontage road is to the south. The reason for the sign reading NARCOTIC CHECK LANE AHEAD was the belief of the KHP that if after reading the sign a driver, particularly an out-of-state driver, turned off at Exit 160, such would possibly indicate that the driver did not want to go through a narcotics check, and would

therefore suggest that he or she might be carrying drugs.

In any event, traffic turning off I-35 at Exit 160 was monitored by the KHP. At approximately 10:50 a.m. on November 12, 1992, Troopers Simone and Heady, who were driving separate cars, were advised that a blue vehicle bearing Nebraska license plates had left I-35 at the Melvern Exit and was proceeding south on a gravel frontage road at a high rate of speed. Both troopers began pursuing the car, Trooper Simone driving 80 miles per hour in order to catch up and make visual contact with the vehicle. After traveling some three and one-half miles, Trooper Simone spotted the vehicle. The car, a light blue Buick LeSabre, was just coming to a stop at a stop sign where the gravel frontage road meets "old" Highway 50. Trooper Simone observed the car turn left, travel a

short distance and then pull into a gas station where the driver stopped near the diesel pumps.

At this point, Trooper Simone drove his care into the gas station and stopped several feet behind the Buick. The driver of the Buick, Magee, left his vehicle and began walking toward Trooper Simone's car. The passenger, Klinginsmith, remained in the Buick. Trooper Simone left his car and asked Magee if he could as some questions. Magee agreed. Magee said he had exited I-35 to look for a gas station, and that he was traveling from Oklahoma City, Oklahoma to Lincoln, Nebraska. Upon request, magee produced a driver's license. Magee indicated that the vehicle had been rented by Klinginsmith. The conversation between Trooper Simone and Magee lasted some 30 seconds.

By this time, Trooper Heady had arrived at the scene and parked behind Trooper Simone's car. His car had a video camera mounted on the dashboard and a wireless microphone, which he used when operating the video camera. Trooper Heady activated the video camera and the microphone, and the events that thereafter occurred at the gas station within view of the camera were tape recorded. The district judge viewed, and heard, the tape at the suppression hearing.

Trooper Simone then proceeded to the passenger's side of the Buick and asked Klinginsmith if he would mind answering a few questions. Klinginsmith consented and said they were coming from Mississippi and that he didn't know just where they were going. He produced a driver's license and the rental papers for the car. Magee, in the meantime, told Trooper Heady that though they were

coming from Oklahoma City, the trip had originated in Mississippi where they had been building parking lots.

Jumping ahead, Trooper Heady asked Klinginsmith if there were any weapons or drugs in the car, and Klinginsmith said there were not. An in response to an inquiry as to whether the car could be searched, Klinginsmith said he had no objection. Magee, in response to inquiry said he, too, had no objection to a search of the Buick.

By this time, a dog had been brought to the scene and it "alerted" to the Buick automobile. At this point, the officers handcuffed Magee and Klinginsmith. The "alerting" and handcuffing occurred about 16 minutes after Trooper Simone had pulled in behind the Buick at the gas station. The key for the trunk was not immediately forthcoming, but eventually Klinginsmith showed the

troopers where the key to the trunk had been hidden. the trunk was then opened and a number of packages of marijuana were discovered under a green tarp. We will consider the amount of marijuana found in the Buick in part III of this opinion. About 38 minutes after the dialogue started between Trooper Simone and Magee, the defendants were arrested and both given a Miranda warning.

Based on the record before him, the district judge denied the motion to suppress, though he did order that the government could not use any statements made by the defendants after they were handcuffed and before they were given the Miranda warning.

In denying, in the main, the motion, the district court reasoned that Troopers Heady and Simone did no violate any of Klinginsmith's Fourth Amendment rights when they followed the Buick vehicle as it exited

I-35 and proceeded south on the frontage road. The district court held that the troopers did not themselves "stop" the other vehicle which was stopped alongside a pump by Magee. The district court concluded that the preliminary questioning concerning driver's license, car registration, where they were coming from, and where they were going, was a consensual encounter, and that even if it was an investigative detention, it was supported by reasonable, articulable suspicion under the Terry-stop doctrine. Further, the district court concluded that within about 15 minutes after the initial dialogue, both Klinginsmith and Magee consented to the car being searched. And when the canine "alerted" to the vehicle, the district court held that the officers had probable cause to arrest the defendants and effect an immediate search under the

automobile exception to the search warrant requirement.

We agree completely with the district court's analysis of this matter. The fact that Troopers Simone and Heady "followed" Magee and Klinginsmith down the frontage road does not constitute a "seizure." See United States v. Langston, 970 F.2d 692, 697-98 n. 3 (10th Cir. 1992) (consensual encounter when driver pulled over after an officer drove up alongside him and made eye contact), cert. denied, 113 S. Ct. 439 (1992), 113 S. Ct. 479 (1992), 113 S. Ct. 495 (1992), 113 S. Ct. 1872 (1993). The troopers did not stop the Buick. Magee did. The questioning of each regarding license, car registration, and the like is permitted by Terry V. Ohio, 392 U.S. 1 (1968) and its progeny, where there is, as in the instant case, reasonable suspicion of criminal

activity.1 Both Magee and Klinginsmith consented to a search of the car, which would have justified the police in searching the Buick without the intervening fact that a dog "alerted" to the vehicle. And when the dog "alerted, " there was probable cause to arrest

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The district court identified several factors which, considering the totality of the circumstances, justified the investigative detention of Magee and Klinginsmith: (1) I-35 is a known avenue for drug transportation; (2) the defendants took an exit which was the first exit after a narcotics check lane sign, and an exit that was seldom used; (3) the defendants traveled down an unmarked gravel road; (4) the driver of the car indicated that they were looking for a gas station, when they had just passed several gas stations on the highway; (5) the defendants appeared very nervous; and (6) they gave conflicting stories about the details of their trip. See United States v. Sokolow, 490 U.S. 1, 8 (1989) (in determining the validity of an investigative stop, the Court must consider the totality of the circumstances).

Magee and Klinginsmith and to search the vehicle without a warrant under the automobile exception even had there been no prior consent. United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989). We think the district court correctly analyzed the course of events, on a step-by-step basis.

II. Sequestration

Prior to trial, apparently upon request, the district court entered a so-called sequestration order concerning witnesses. As far as we can tell, the sequestration order is not in the record before us. In any event, on the second day of the trial, in the morning, Magee was called as a government witness. Whether it developed on cross-examination of Magee, we cannot tell, but defense counsel advised the court that he believed that possibly there had been a violation of the

sequestration order in that Magee had discussed his testimony with the Assistant United States Attorney and Troopers Simone and Heady earlier that same morning. The district court thereafter held an immediate hearing on the matter, outside the presence of the jury, at which time Troopers Simone and Heady, and also Magee, were examined and cross-examined by counsel. At the conclusion of the hearing, the district court found that any violation of the sequestration order did not result in prejudice to Klinginsmith. We agree.

The district judge apparently did not have the sequestration order before him, and it is not in the record before us. Its terms, then, are uncertain, at least so far as we are concerned. At the hearing, it developed that the Assistant United States Attorney had brief conversation with Troopers Heady and Simone on the previous evening, at which time he asked

Heady to be present when he talked with Magee the next morning before trial reconvened. Both troopers had already testified. Apparently Magee was brought to courthouse that night and placed in a holding cell adjacent to the Marshal's office. A short meeting was held at 8:00 a.m. on the second day of trial. And what occurred at this meeting was fully developed by counsel.

At the outset, the Assistant United States Attorney, of course, has a right to interview his witnesses before they testify, and any sequestration order could not prohibit such. Trooper Heady was the "case agent" on the case, and he, too, by virtue of that fact, was apparently immune from any sequestration order. Trooper Simone was simply present at this meeting, and the conversation was primarily between the Assistant United States Attorney and Magee.

The district judge heard from all parties involved and denied the motion for a mistrial. He examined the matter carefully, and his reasoning was fully set forth and is attached to this opinion as an attachment. Even assuming a violation of a sequestration order, which we cannot ascertain, the court still would have to decide whether the rather drastic remedy of a mistrial is required. See United States v. Buchanan, 787 F.2d 477, 485 (10th Cir. 1986) (even if a sequestration order is violated, the defendant must still show that probable prejudice resulted from the violation); see also United States v. Greschner, 802 F.2d 373, 376 (10th Cir. 1986), cert. denied, 480 U.S. 908 (1987). The district court determined that a mistrial was not necessary, and we agree.

III. 80 Kilograms

The Sentencing Guidelines provide that if the amount of marijuana is at least 80 kilograms, but less that 100 kilograms, the base offense level is 24, whereas if the amount is less than 80, but at least 60 kilograms, the base offense level is 22. USSG § 2d1.1(c) (10) and (11). Counsel contended that the amount involved was less than 80 kilograms and objected to that part of the presentence report which found that at least 80 kilograms of marijuana was taken form the Buick LeSabre. A hearing was held, and the district court found that the amount involved was at least 80 kilograms and accordingly found a base offense level of 24. On appeal, counsel argues that the district court's finding is not supported by the record.

Found in the trunk of the Buick car were

10 "bricks" of marijuana wrapped in Saran Wrap, and 2 paper sacks containing lesser amounts of marijuana were found inside luggage in the Buick's passenger compartment. The KHP weighed the marijuana thus seized on November 12, 1992, and ascertained that it weighed 82.55 kilograms, including packaging. The marijuana was turned over to the Kansas Bureau of Investigation and James Baer, a chemist with that agency, testified that on December 12, 1992 he weighed the marijuana and found it to have a net weight of 80.3 kilograms. On order of court, Baer again weighed the marijuana on July 8, 1993, and found it to then have a net weight of 76.72 kilograms. He explained that with the passage of time there was a loss of moisture, and he offered an expert opinion that on November 12, 1992, the marijuana weighed more than 80 kilograms. The district court found that the total amount of

marijuana was at least 80 kilograms, and we cannot say that such is unsupported by the evidence. The test is what did the marijuana weigh on November 12, 1992, including the moisture content thereof. United States v. Pinedo-Montoya, 966 F.2d 591, 595-96 (10th Cir. 1992); United States v. Molina-Cuartes, 952 F.2d 345, 348-49 (10th Cir. 1991), cert. denied, 112 S. Ct. 1698 (1992).

Judgment affirmed.

Appendix B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	) Case No.
	) 92-40062-01/02
	)
FREDERICK ALDON MAGEE and	)
MARK BRADLEY KLINGINSMITH	)
	)
Defendant.	)
	)
	)

MEMORANDUM AND ORDER

This matter is presently before the court upon several pretrial motions filed by the defendants. The court has conducted a hearing on these motions and is now prepared to rule.

The defendants are charged with conspiracy to possess with the intent to distribute approximately 182 pounds of marijuana in violation of 21 U.S.C. § 846 and possession with the intent to distribute approximately 182 pounds of marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Defendant Mark Bradley Klinginsmith has filed the following motions: (1) Brady motion for discovery of all favorable evidence of defendant's connection with searched items for defendant's motion to suppress (Doc. #9); (2) motion to suppress (Doc. #10); and (3) motion for discovery (Doc.

#11). Defendant Fred Aldon Magee has filed the following motions: (1) motion to suppress (Doc. #12); motion to join (Doc. #13); and (3) motion for Rule 16 materials (Doc. #14).

MOTIONS TO SUPPRESS

The defendants seek suppression of any statements or physical evidence that was obtained on November 12, 1992, the date of their arrest. The defendants contend that they were illegally seized on that date and that all evidence that was taken should be suppressed.

The court has heard considerable evidence on these motions and is now prepared to issue the following findings of fact and conclusions of law:

Findings of Fact

1. On November 12, 1992, at approximately 9:00 a.m., the Kansas Highway Patrol (KHP) began an operation on the

northbound lanes of Interstate 35 (I-35) in Osage County, Kansas. Law enforcement officials in Kansas consider I-35, a four-lane highway, a major thoroughfare for drug couriers. The KHP placed a large sign next to the highway at a location just prior to Exit 160, an exit for Melvern, Kansas. The sign read: "NARCOTIC CHECK LANE AHEAD." The sign was a ruse since there was actually no checklane being maintained by the troopers. The sign was placed at this location for several reasons. The Melvern exit was selected because it is a "desolate area." The surrounding area is rural with the nearest town approximately five miles away. The exit is seldom used even by local traffic. There is no indication that any services are located at that exit. The nearest services on the highway are five miles south at Beto Junction, where U.S. Highway 75 crosses I-35. A sign on

the exit indicates that Melvern is to the north and a frontage road is to the south. A traveler proceeding to the south will be driving on a gravel road. There are no signs indicating where the gravel road leads.

2. In planning the operation, a number of KHP troopers met on the morning of November 12. The plan called for a KHP aircraft to be in the air and to provide information on traffic violations to ground units, which consisted of both marked and unmarked cars. A number of ground units were in position to act upon any traffic violations or suspicious activity. The use of the aircraft was aborted shortly after the operation began because of weather problems.

3. At approximately 10:50 a.m., Troopers Kirk Simone and William Heady, who were driving separate cars, were advised that a blue vehicle with Nebraska license plates

had left I-35 at the Melvern exit and was proceeding south on the gravel road at a rapid rate of speed. Both troopers began pursuing the car. Trooper Simone drove down the gravel road at speeds in excess of eighty miles per hour in an effort to make visual contact with the vehicle. After traveling three to three and one-half miles, Trooper Simone spotted the car. The car, a light blue Buick LeSabre, was just coming to a stop at a stop sign where the gravel road meets "old" highway 50. Trooper Simone observed the car turn left, travel a short distance, and then pull into a gas station. The car stopped near the diesel pumps. Trooper Simone followed the car to the gas station and parked several feet behind it. Trooper Simone was driving a dark blue unmarked car. As Trooper Simone parked, the driver of the other car immediately exited his vehicle and began walking towards Trooper

Simone's car. The passenger remained in the car. Trooper Simone met the driver of the other car at the left rear of the Buick. Trooper Simone, who was wearing his KHP uniform, asked the driver if he could ask him some questions. The driver agreed to answer some questions. The driver told Trooper Simone that he had exited I-35 to search for a gas station. This response appeared suspicious to Trooper Simone because the driver had just passed several large gas stations and truck stops at Beto Junction, and the twosome had traveled down a gravel road without any indication whatsoever as to what was at the end of the gravel road. The driver told Trooper Simone that he was traveling Oklahoma City to Lincoln, Nebraska. Trooper Simone noticed that he looked very nervous. Trooper Simone asked the driver if he would produce his driver's license and vehicle

papers. The driver produced a driver's license indicating that his name was "Fred Aldon Magee." Magee indicated that the car had been rented by the passenger. This encounter with Magee was very brief, approximately thirty seconds in length.

4. By this time, Trooper Heady had arrived and parked behind trooper Simone's car. Trooper Heady was driving a marked KHP vehicle. His car had a video camera mounted on the dashboard. He also had a wireless microphone which he used when operating the video camera. Prior to pulling into the gas station, Trooper Heady activated the video camera and the microphone. The events that occurred at the station in view of the camera were recorded. All conversations involving Trooper Heady or within earshot of his microphone were also recorded, except for three occasion, once when he turned off the

microphone and warned Trooper Simone about the use of profanity, once when he accidentally turned off the sound, and once when the camera apparently malfunctioned. The videotape indicates that the camera was turned on at 10:56 a.m.

5. Trooper Simone proceeded to the passenger's side of the Buick and asked the passenger if he minded talking with him. The passenger indicated that he would not mind speaking with Trooper Simone. The passenger told him that they were coming from Mississippi and he did not know where they were going. The passenger produce a driver's license and the rental papers for the car. The driver's license identified the passenger as Mark Bradley Klinginsmith. Trooper Simone observed that Klinginsmith looked ill. Klinginsmith told Trooper Simone that he was sick with diarrhea.

6. Trooper Simone returned to speak with Trooper Heady. He told Trooper Heady that he believed that the car had drugs in it, and he asked Trooper Heady to take over the matter. He provided Trooper Heady with the car rental papers. Trooper Andy Thomason arrived at approximately this time. He was left at the gas station by his partner, who left in their marked unit.

7. Magee told Trooper Heady that he and his passenger were coming from Oklahoma City but their trip had originated in Mississippi, where they had been building parking lots. Trooper Heady informed him that he was not in trouble, but that he wished to ask him some questions. Magee readily agreed to talk with Trooper Heady. They continued their conversation in Trooper Heady's patrol car because it was a cold, windy day. Trooper Heady discussed their trip and indicated that

he was suspicious that they left I-35 and traveled down a gravel road to find a gas station when they had just passed on five miles back at Beto Junction. Trooper Heady noticed that Magee became extremely nervous during their conversation. He noticed that Magee failed to make eye contact with him and took some time in answering his questions. Trooper Heady asked Magee if he would mind if he ran a check on his driver's license. Magee indicated that he had no objection. Trooper Heady then sought and NCIC and Interstate Identification Index check by radio. Trooper Heady returned the driver's license to Magee at this time. Trooper Heady asked if he could review the car rental agreement, and Magee consented. Trooper Heady noticed a problem on the agreement concerning the due date of the car and brought this matter to Magee's attention. Magee indicated that Klinginsmith

had rented the car. This conversation lasted approximately five minutes.

8. While Trooper Heady continued his conversation with Magee, Trooper Simone asked Magee if he wanted the car filled up with gas. Magee indicated that he did want the car filled up with gas. Klinginsmith moved the car to the gasoline pumps, exited the car, and proceeded into the gas station. Trooper Thomason and Trooper Simone followed him into the gas station. Trooper Thomason was told by individuals in the gas station that Klinginsmith had gone into the bathroom. The two troopers approached the bathroom. Trooper Simone knocked on the door and asked Klinginsmith if he could conduct a pat down search of him and a general search of the bathroom. Klinginsmith opened the door and agreed to the searches. Trooper Simone frisked Klinginsmith and looked around the

bathroom, which was very small. Trooper Simone found nothing , left the bathroom, and went back outside. Trooper Daniel Dick arrived at this time in his patrol car. Trooper Dick is a narcotic detection canine handler. He had with him his dog, "Chief."

9. Trooper Simone learned that the car took less than four dollars worth of gas. Trooper Simone then told Trooper Dick to move the defendants' car since it was blocking access to the gasoline pumps.

10. Trooper Heady then began conversing with Klinginsmith. At the outset, Trooper Heady told Klinginsmith that he was not under arrest and that Trooper Heady was not trying to unlawfully detain him. Trooper Heady explained that he was suspicious about their actions in leaving the highway and traveling on a gravel road in search of a gas station. Klinginsmith also appeared very nervous to

Trooper Heady. He noticed a lack of eye contact and anxious pacing. Trooper Heady asked Klinginsmith if there were any firearms in the car. Klinginsmith responded, "No." Trooper Heady then asked if there were any drugs or large amounts of money in the car. Klinginsmith replied, "No. Do you wanna take a look?" Trooper Heady then asked if Klinginsmith had any objections to a search of the car. Klinginsmith said, "No. What did Fred say?" Trooper Heady then asked if Klinginsmith that he would ask Magee about searching the car. This conversation lasted less than five minutes.

11. Trooper Heady approached Magee and asked him if they were carrying any guns, drugs, contraband or large amounts of money. Magee replied that they were not. Trooper Heady asked if he had any objection to a search of the car. Magee replied, "None

whatsoever." Trooper Heady also asked if he had any problem with using the dog in the search of the car. Magee responded, "No."

12. Trooper Dick was then called in to use his dog to sniff the outside of the car. The dog alerted to the right rear fender of the car. He gave passive alert, sitting down at that point. The positive alert occurred at approximately 11:12 a.m. Following the positive alert, the defendants were patted down and placed in handcuffs. The troopers then attempted to find the key to the trunk of the car. Magee and Klinginsmith were uncooperative in the troopers' efforts to find the key. The troopers pointedly asked for the key to the trunk and informed Magee and Klinginsmith that they would be responsible for any damage done to the car if the troopers were forced to physically open the trunk. The troopers also told them that "stalling is not

going to help." Efforts were made to find the key and open the trunk, but they were unsuccessful. Eventually, Klinginsmith showed the troopers where the key to the trunk was hidden.

13. The trunk was opened and a number of packages of marijuana were discovered under a green tarp. Magee and Klinginsmith were placed under arrest at approximately 11:34 a.m. and given their Miranda warnings. A subsequent search also revealed some marijuana in some luggage found in the backseat of the car.

14. During this encounter, all of the KHP troopers were dressed in their complete uniforms. The troopers wore guns but did not unholster their weapons. Neither the flashing lights nor the sirens were ever activated on any of their vehicles. Their cars did not block the path of the defendants or the

defendants' vehicle. The defendants were told prior to agreeing to the search of their car that they were not under arrest. The defendants were not commanded or directed to do anything. They consented to each request made by the troopers. Both defendants were cooperative and did not object to the troopers' actions.

15. Prior to defendants' car exiting, only one vehicle had left I-35 at the Melvern exit. This vehicle, a truck with Missouri license plates, stopped voluntarily in the roadway of the exit. Trooper Simone did talk with the driver and made no effort to detain him. There was no evidence presented that the troopers intended to stop every car that left the highway at the Melvern exit or that they intended to stop only out-of-state vehicles.

Conclusions of Law

1. There are three categories of police-

citizen encounters: "(1) voluntary encounters, which are not seizures and do not implicate the Fourth Amendment; (2) investigative detentions, [often called Terry stops], which are seizures within the meaning of the Fourth Amendment and must be supported by reasonable suspicion; and (3) arrests, which are even more intrusive and must be supported by probable cause." United States v. Ward, 961 F.2d 1526, 1529 (10th Cir. 199). Prior to the positive alert by the dog, the defendants were not "seized" within the meaning of the Fourth Amendment. "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." Florida v. Bostick, 501 U.S. ___, __, 111 S.Ct. 2382, 2386 (1991). In determining whether an individual has been seized, "the crucial test is whether, taking into account all of the circumstances

surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" Bostick, 111 S.Ct. at 2387 (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)).

2. The defendants have vaguely suggested that they did not voluntarily stop at the gas station, but that they were stopped by Trooper Simone. In apparent support of this argument, they have noted three matters: (1) a reference in a report prepared by Trooper Dick to this incident as a traffic stop; (2) a statement in Trooper Simone's report that he "overtook" the defendants' car in his pursuit of them on the gravel road; and (3) Trooper Simone's "bad" reputation for truth and veracity in cases such as this one. The court finds that the evidence clearly demonstrates

that the defendants voluntarily stopped their vehicle. The matters noted by the defendants fail to convince the court otherwise, particularly in light of all of the evidence presented. The references in the reports were adequately explained by the troopers who prepared the reports. The court found Trooper Simone's account of the events of November 12th credible. The videotape of the incident supported his testimony. The evidence demonstrated that the troopers did not in any way signal for the defendants to stop their car. They did not use their flashing lights or sirens. They made no effort to command or direct the defendants, and they did not block their path. Under such circumstances, the court concludes that the initial encounter between the troopers and the defendants was consensual since the defendants voluntarily stopped their vehicle. See United States v.

Langston, 970 F2d 692, 698-98 n. (10th Cir. 1992) (consensual encounter where driver voluntarily stopped car after police drove beside car and made eye contact with driver). Moreover, the events that occurred following the initial encounter also indicate a consensual encounter. The defendants' contention that they were seized after the initial questioning is not supported by the evidence. This encounter occurred in a public place where the defendants were within the view of persons other than law enforcement officers. This fact is "particularly significant" in considering whether an encounter was consensual. United States v. Ward, 961 F.2d at 1531. In addition, the defendants were told that they were not under arrest and that they had done nothing wrong. The defendants were cooperative and made no objections to the troopers' actions.

Klinginsmith voluntarily consented to a pat-down search in the bathroom. Each defendant voluntarily consented to a search of the car. The defendants were closely watched by the troopers during the entire encounter at the gas station, but troopers did not restrict their travel or in any way direct it. Finally, we do not find that the troopers' failure to advise the defendants that they could refuse to answer questions or that they were free to leave suggests a seizure under all of the circumstances. Whether an individual is advised of his rights is important, but this factor by itself does not determine whether a seizure has occurred. Id., at 1533. The defendants were specifically advised by Trooper Heady that they were not under arrest. He made no statements to them suggesting that they must remain at the gas station and answer his

questions. In sum, under the totality of the circumstances, we believe that a reasonable person would have felt free to leave and to refuse to talk to the troopers.

3. Even if the questioning prior to the handcuffing of the defendants was considered an "investigative detention," and therefore a "seizure" for Fourth Amendment purposes, we believe reasonable, articulable suspicion supported the seizure. To justify an investigative detention of a person, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. United States v. Cortez, 449 U.S. 411, 417-18 (1981. In evaluating the validity of a Terry stop, the court must consider the totality of the circumstances. United States v. Sokolow, 490 U.S. 1, 8 (1989). Here, the totality of the circumstances suggests that

the investigative detention of the defendants was constitutionally justified. The following facts support this conclusion:

(1) I-35 is a known avenue for transporting drugs; (2) the defendants had exited the highway at a seldom used exit immediately following the location of a narcotics checklane sign; (3) the defendants traveled down a gravel road that was not identified in any way; (4) defendant Magee indicated that they had exited the highway to find a gas station when he had just passed several gas stations at a well-marked exit; (5) the defendants appeared very nervous upon initial questioning; and (6) the defendants gave conflicting stories about the details of their trip. When a reasonable, articulable suspicion exists that a person is or is about to be engaged in criminal activity, investigative detention for questioning is

constitutionally justified. Ward, 961 F. 2d at 1529.

4. The defendants were detained after the alert by the dog to the car. The troopers at that time had probable cause to detain the defendants, obtain a search warrant, or search the car pursuant to the "automobile exception." See Florida v. Royer. 460 U.S. 491, 506 (1983) (plurality opinion); United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989); United States v. Williams, 726 F.2d 661, 663 (10th Cir.), cert. denied, 467 U.S. 1245 (1984). The troopers then sought to gain access to the trunk either by obtaining the key to the trunk or by opening the trunk in some fashion. Ultimately, the troopers gained access by using the key that was produced by Klinginsmith after he demonstrated some reluctance to do so.

5. The defendants have suggested that the circumstances show that they withdrew their consent to search the trunk of the car when they refused to produce the key. Even assuming that consent was withdrawn, we find that the search of the trunk was justified under the automobile exception to the search warrant requirement. The automobile exception justifies a police search of an automobile traveling on a highway, including all containers therein, upon probable cause to believe that it contains contraband. Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Ross, 456 U.S. 798, 825 (1982); United Sates v. Arias, 923 F.2d 1387, 1389-90 (9th cir. 1991); United States v. Stone, 866 F.2d at 364. Moreover, even if the automobile exception did not apply and consent to search had been withdrawn, the court would still be unable to conclude that the marijuana found in

the trunk must be suppressed. The marijuana would have inevitably been discovered either through a search warrant or an inventory search. See United States v. Andreade, 784 F.2d 1431 (9th Cir. 1986) (cocaine discovered one hour after defendant's arrest during search of garment would have inevitably been discovered through post-arrest inventory procedure).

6. Following the positive alert by the dog, the defendants were placed in handcuffs. At this point, we find that the defendants were under arrest and should have been given their Miranda warnings. See Oregon v. Mathiason, 429 U.S. 492, 494 (1977) (Miranda warnings must be given when there is a "significant deprivation of freedom"). Any statement made by the defendants after that time in response to questions by the troopers prior to being told their Miranda rights must

be suppressed. See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) ("[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.") The defendants were questioned by Trooper Heady about the location of the key to the trunk. We find that all statements made by the defendants following the time they were placed in handcuffs must be suppressed. This would preclude introduction of defendants Klinginsmith's conduct in showing the troopers where the key to the trunk was located. Again, we do not find that this ruling requires suppression of the marijuana because it would have inevitably been discovered.

7. The defendants have contended that the "Narcotics Check Lane" established by the KHP was unconstitutional. we find it unnecessary to reach this issue since the

evidence has not demonstrated that a "Narcotics Check Lane" was ever established by the KHP or that the defendants were stopped as the result of a Narcotics Check Lane. In addition, there is no indication that the defendants were affected in any manner by the placement of this sign. The court heard no evidence that they exited the highway as a result of this sign. They have suggested that they exited in an effort to find a bathroom. Even were we to reach the question of the constitutionality of the sign, we find no support for the defendants' arguments.